No. 83-116

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

KHALIL T. SHAHEED,

Petitioner

-v-

ADAM METAL & SUPPLY COMPANY, KENNETH R. LALLY, individually and as President of Adam Metal & Supply Company, and ALUMINUM COMPANY OF AMERICA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does §704(a) of the Civil Rights Act of 1964 or 42 U.S.C. §1981 prohibit an employer from taking an adverse personnel action based on its unilateral determination that an employee's statements at an EEOC Fact Finding Conference were false and from admittedly using that determination to disbelieve everything the employee says?

2. What standard should the court apply when determining whether retaliation played a part in the discharge of an employee for giving testimony at an EEOC Fact Finding Conference?

3. Did the trial court deny due process and abuse its discretion by substantially precluding cross-examination of the principal witness proferred by the employer, thereby depriving the civil rights plaintiff of his opportunity to meet his burden to establish his case?

4. Did the trial court abuse its discretion in assessing attorney's fees against the plaintiff where the claim was not frivolous or groundless?

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The names of all parties to that proceeding are contained in the caption of this petition.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE THIRD CIRCUIT

Khalil T. Shaheed petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit entered on May 18, 1983.

OPINIONS BELOW

The opinion of the District Court for the District of New Jersey, setting forth its findings of fact and conclusions of law, is at Appendix page 3.[1/] It has not been formally reported. Its judgment is at A 36-38. The Third Circuit Court of Appeals entered judgment without opinion. A 1. The judgment has not been formally reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

[1/] The Appendix will be hereinafter referred to as "A" followed by the appropriate page number.

STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Civil Rights Act of 1866, as codified at 42 U.S.C. §1981, provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, taxes, licenses, and exactions of every kind, and to no other.

2. Section 701 of the Civil Rights Act of 1964, as codified at 42 U.S.C. §2000e-1, provides:

> For the purposes of this title--
>
> (a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.
>
> (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more

calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5 of the United States code), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954, except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

3. Section 704(a) of the Civil Rights Act of 1964, as codified at 42 U.S.C. §2000e-3(a), provides:

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified,

assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

Plaintiff, Khalil T. Shaheed, a black man, was hired by Adam Metal & Supply Company on May 30, 1979 as a "shape" driver. (A 6) A "shape" driver reports daily but only works when there is an actual assignment. (A 13) Shaheed was terminated on April 21, 1980.2/ Adam Metal, its president, Kenneth R. Lally, and Aluminum Company of America (ALCOA), the parent corporation of Adam Metal were named as defendants below. Jurisdiction in the district court was premised upon 28 U.S.C. §§1331, 1337, 1343 and pendent jurisdiction.

General Background

The facts of this case are fairly simple and straightforward. In June 1979, Shaheed began to experience racial harassment from his coworkers. He complained to the company, but no efforts were made to stop the harassment. (A 42) In September 1979 Shaheed informed the company that he was going to file a civil

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2/ All dates herein refer to the year 1980 unless otherwise indicated.

rights complaint against the company because of the harassment and because he felt that he was being treated unequally from the white workers. (A 4) He filed a charge with the Equal Employment Opportunity Commission (EEOC) that same week. (A 43) The EEOC did not take further action on the charge until it conducted a Fact Finding Conference on April 21.[3/]

In November 1979, Shaheed sustained an injury to his back when he was attacked, beaten and shot by a mugger. (A 9) He was hospitalized and continued under medical care when he returned to work. On Friday, April 18, Shaheed reported to work but asked to be released because he was experiencing back pains, and he did not feel well enough to drive. (A 11) The company dispatcher approved Shaheed's request and initialled his timecard. (A 64)

On Monday, April 21, Shaheed went to the previously scheduled EEOC Fact Finding Conference. Lally and N. Rebecca Shaw, an ALCOA attorney, were also present. (A 4, 65) Shaheed recounted his complaints including that his coworkers had locked cats in his truck overnight and the cats' urination and defecation caused malodorous working conditions. Lally contested Shaheed's claims. (A 65)

3/ Shaheed presented evidence below that he suffered retailatory discipline throughout this period. That discipline is not in issue in this petition.

On April 22, Shaheed reported to work and was handed two letters. One was dated April 18 and informed him that he was under investigation for leaving work. The other was dated April 21 and informed him that, as the investigation was complete, he was terminated. (A 18) Lally never talked to Shaheed during the investigation to get an explanation or to verify his medical excuse. No one from the company ever told Shaheed that he was under investigation. Lally stated that he had made the decision to fire Shaheed after the EEOC Fact Finding Conference, after consulting with ALCOA, based on the "gut feeling" that Shaheed was not legitimately ill. (A 50)

On April 24 Shaheed returned with his union agent and saw Lally for the first time since April 21. (A 12) Shaheed attempted to present a medical excuse to explain his absence. Although Lally said he would reconsider his decision if Shaheed were really ill, he rejected the excuse and the request to reinstate Shaheed.(A 48) Lally explained his reasoning:

> Well, Mr. Shaheed was saying to me that you don't believe me, why. And I sort of chuckled and said that after some of the wild stories you told yesterday, that that is just an example. I don't believe you in just about anything you say.
>
> * * *
>
> Q. No, what were you referring to when you made that statement?

A. Well, at this time, I guess it's referred to as that famous cat story.

A 48

The Judicial Proceedings

Shaheed filed a complaint alleging retaliation, and discrimination under Title VII, 42 U.S.C. §1981 and state laws. The case came to trial in March 1981. On the first day of trial the court granted summary judgment in favor of ALCOA on the basis that it neither bore direct or indirect responsibility for the firing of Shaheed. (A 41)

After Shaheed presented his case,[4/] defendants presented only two witness. One witness testified only about one minor issue not directly related to the events of the discharge. The only other defense witness was Lally. He testified extensively on direct examination about his acts and their justification, including an explanation of the events of April 18, 21 and 24. On cross-examination, Shaheed probed into the underlying facts of the company policies, the earlier discipline of him and the discipline meted out to other employees. During the course of cross-examination, the trial judge abruptly announced that he would only allow

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4/ Shaheed was precluded from presenting two witnesses on his behalf because of an alleged failure to comply with a notice requirement in the pretrial order.

one additional hour of cross-examination. (A 52-54) Plaintiff was unable to finish cross-examination on the events of April 18, the investigation of Shaheed, the Fact Finding Conference of April 21 or the request for reinstatement on April 24. Plaintiff made oral and written objections to the conduct of the judge. (A 56)

At the close of the case, the district court ruled against Shaheed on all counts of his complaint. With respect to the allegations that Lally used Shaheed's statements to the EEOC as the basis for the discharge, the court found that the statements "even if considered in connection with his discharge was not a use of such testimony as would comprise a retaliatory termination." (A 19) The court also imposed attorneys fees of $3,806.50 against Shaheed, ruling that his joining of ALCOA had been frivolous. Plaintiff moved for amendment of the judgment but this was denied. (A 37)

The Court of Appeals for the Third Circuit affirmed the district court's judgment without opinion. (A 1)

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CONFLICT CONCERNING THE IMPORTANT QUESTION OF THE EXTENT TO WHICH AN EMPLOYER CAN RELY ON STATEMENTS MADE IN AN EEOC PROCEEDING AS THE BASIS FOR DISCHARGE OF AN EMPLOYEE

Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a), makes it an unlawful employment practice for an employer to discriminate against an employee because the employee "has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this subchapter." Notwithstanding this provision, the Court of Appeals for the Third Circuit, by adopting the trial court's opinion, found that under certain circumstances an employer can permissibly use an employee's statement made in the course of an EEOC proceeding as a basis for discharging that employee.

The courts below found that the employer in this case was entitled to unilaterally determine that plaintiff's EEOC statements were false and use that determination to decide that plaintiff was lying in another matter. The discharge of plaintiff for the other matter was considered to be a secondary usage of the EEOC statement and, as such, did not enjoy the protection of the anti-

retaliation provision.[5/] The Third Circuit's position in this case creates a divergence of opinion among the circuits on the issues of (1) the extent of the protection given to statements made to the EEOC and (2) what test is to be used to determine whether the EEOC statement was a reason for the discharge when the evidence suggests mixed motives.

A. Adverse Use of Statements Made to the EEOC

The circuits which have ruled on the issue of the extent of the protection which

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[5/] The courts below accepted that defendants did use plaintiff's statements to the EEOC as part of the decision to discharge. The trial court concluded that plaintiff had made out his prima facie case based on timing and on Lally's explanation that plaintiff's lack of credibility was the result of statements he made to the EEOC. A 5. The court explained, and made a specific finding, that Lally was justified in assessing plaintiff's credibility because the statement concerning the cats was incredible. A 14. Furthermore, the court found that if Lally's belief was proven wrong, he would have rehired plaintiff. A 11. Lally's admission that he did not believe plaintiff because of his EEOC testimony is the direct cause of a failure to rehire. A 48. Even if the retaliation occurred after the initial decision to discharge, it is still retaliation and prohibited by Title VII. Cf. Abramson v. University of Hawaii, 594 F.2d 202, 210-211 (9th Cir. 1979)

the anti-retaliation provision gives to EEOC testimony have generally followed the lead of the Fifth Circuit in Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969). The court in that case concluded that statements made by an employee to a civil rights agency, even if they are without merit or are falsely or maliciously made, are privileged in that employers may not make adverse personnel decisions based on those statements. See also Sias v. City Demonstration Agency, 588 F.2d 692, 695 (9th Cir. 1978); Abramson v. University of Hawaii, 594 F.2d 202 (9th Cir. 1979); Womack v. Munson, 619 F.2d 1292, 1298 (8th Cir. 1980); Payne v. McLemore's Wholesale Stores, 660 F.2d 496 (5th Cir. 1981).

The scheme of enforcement of the rights granted under Title VII requires that a charge of discrimination be filed with the EEOC. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974). The EEOC must have the opportunity to investigate and conciliate charges that are brought before it. See Johnson v. Seaboard Airline R.R. Co., 405 F.2d 645 (4th Cir. 1968) cert. den. sub nom Pilot Freight Carriers, Inc. v. Walker, 394 U.S. 918 (1969).

In Pettway v. American Cast Iron Pipe Co., 411 F.2d at 1005, the Fifth Circuit specifically found that the anti-retaliation clause of Title VII was essential to the administration of that statute because it protected the filing of charges and the giving of information. This court has found a

similar purpose to anti-retaliation clauses in other statutes. See, e.g., NLRB v. Scrivener, 405 U.S. 117 (1972), reh. den., 405 U.S. 1033 (1972). Apart from this decision of the Third Circuit, the other courts have held that access to the EEOC, and subsequently to the courts, is protected by allowing only the administrative and judicial mechanisms to determine the truth, falsity, frivolousness or maliciousness of an EEOC statement. An employer may not take action based upon its unilaterial determination, for that would make it too perilous for an employee to initiate an EEOC investigation.

Unlike the approach used by the Fifth, Eighth and Ninth Circuits, the Third Circuit in this case would permit the employer to decide that a statement made to the EEOC was false and to discharge the employee based upon what the trial court characterized as "secondary usage" of that statement.[6/] A 15. In adopting this analysis, the Third Circuit ignores this court's instructions in Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) that the court must assess whether employee discouragement will be a "natural consequent" of the employer's use of the EEOC

6/ "Secondary usage" apparently refers to the employer's thought processes. The court would not permit the employer to discharge an employee for making a false statement to the EEOC. However, it would permit the employer to determine that the employee was not credible and discharge him for that reason, the latter being a "secondary usage" of the EEOC statement.

statements. See also NLRB v. Burnup and Simms, Inc., 379 U.S. 31, 33 (1964). This court should grant the writ of certiorari to resolve the conflict and decide the important question concerning the extent of the protection against adverse use of statements made to the EEOC.

B. Mixed Motive Discharges

There is a conflict and confusion among the circuits about what standard is to be used when the evidence in a retaliation case suggests that there is a mixed motive for the discharge. Although this question has recently been resolved in the context of cases arising under the National Labor Relations Act, 29 U.S.C. §151 et seq., NLRB v. Transportation Management, Corp., ___ U.S. ___, 51 U.S.L.W. 4761 (1983), the question remains open in the context of violations of §704(a) of Title VII.

At one end of the spectrum, some courts have required only that retaliation has played a part in the adverse action. See, e.g. EEOC v. Kallir, Phillips, Ross, Inc., 401 F.Supp. 66 (S.D.N.Y. 1975) aff'd 559 F.2d 1203 (2nd Cir. 1977), Green v. McDonnell-Douglas Corp., 463 F.2d 337, 346 (8th Cir. 1972) (Lay, J., concurring) rev'd on other grounds 411 U. S. 792 (1973). Other courts have adopted a substantiality test. See, e.g. Monteiro v. Poole Silver Co., 615 F.2d 4 (1st Cir. 1980). It has also been suggested that the court apply the still stricter standards articulated in Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979) and Mt. Healthy

City School District v. Doyle, 429 U.S. 274 (1977). Womack v. Munson, supra at 1298. The Ninth Circuit has articulated a "but for" test for mixed motive retaliatory discharges under Title VII. Kauffman v. Sidereal Corp., 677 F.2d 767 (9th Cir. 1982).

Although the Third Circuit had previously adopted the "at least in part" test, Goodwin v. City of Pittsburgh, 480 F.Supp. 627 (W.D. Pa. 1979) aff'd 624 F.2d 1090 (3rd Cir. 1980), the instant case adopts a different analysis. The trial court had found the plaintiff established his prima facie case of retaliation. (A 5) Defendant articulated a non-discriminatory reason for the discharge, but admitted that it had used plaintiff's EEOC statements in making its decision. The court did not apply any of the tests for determining whether retaliation was a causative factor in the discharge. Rather, it ignored the causation issue altogether and found that the employer's use of plaintiff's statements was not to be considered notwithstanding any part it might have played in plaintiff's discharge.

This ruling by the courts below significantly alters the order and allocations of the burdens. The courts have generally applied the allocations of the burdens of persuasion and proof set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) to retaliation cases under Title VII. See Kauffman v. Sidereal Corp., supra; Womack v. Munson, supra; Goodwin v. City of Pittsburgh, supra. Plaintiff's establishment of a prima facie

case on causation created a legally mandated inference of discrimination. Defendants' inability to present a non-discriminatory reason that was not based upon the statements made to the EEOC was recognized by the trial court. A 5. However, the court discarded the inference of discrimination without logical explanation. Thus, despite the existence of the inference of discrimination, the courts below failed to determine the degree to which the discharge was based on the protected activity.

This is not a proper allocation of the burdens. Since the inference of discrimination was never rebutted, "the burden would be on the defendants to show by a preponderance of the evidence that he would have reached the same decision even if, hypothetically, he had not been motivated by a desire to punish plaintiff..." NLRB v. Transportation Management Corp., supra. This court should grant the writ of certiorari for the purpose of resolving the question of what standard is to be applied and how the burdens are to be allocated in a mixed motive discharge under 704(a) of Title VII.

II. THE COURTS BELOW ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW AS TO WHETHER THE TRIAL COURT DEPRIVED PLAINTIFF OF A FAIR TRIAL BY SUBSTANTIALLY PRECLUDING CROSS-EXAMINATION OF DEFENDANT'S PRINCIPAL WITNESS

The result of the Court of Appeals' affirmance of the judgment below is the approval of the trial judge's conduct in curtailing the cross-examination of the principal defense witness, Kenneth Lally. Lally was the president of defendant Adam Metal. He was an individually named defendant and the main actor for the company concerning the events of the discharge.

Not only did Lally discharge Shaheed, but also he was the only company witness to testify about the events which were directly involved in the discharge. Certainly, much of the case depended on what Lally was thinking and why on April 18 when he was informed that Shaheed had gone home sick, on April 21 when he listened to Shaheed at the EEOC and when he later made the decision to discharge him, and on April 24 when he refused to consider reinstatement because of the "wild stories" Shaheed told to the EEOC at the Fact Finding Conference. Shaheed could only testify as to his own thoughts and actions, and after the morning of April 18, he had no personal knowledge of most of the events that culminated in his discharge.

The general rule is that the extent of cross-examination on an appropriate subject of inquiry is within the sound discretion of the trial court which may exercise reasonable judgment in determining when a subject is exhausted. Alford v. United States, 282 U.S. 687, 688 (1931). Rule 611(b) of the Federal Rules of Evidence (FRE) sets the guidelines for the exercise of discretion in limitation of questioning to the subject matter of direct examination and to matters affecting the witness's credibility. Rule 403, FRE, permits exclusion of evidence for considerations of undue delay, waste of time or needless presentation of cumulative evidence. Relevancy is also a factor in the breadth of cross-examination allowed. Subject matter central to the issues merits extensive questioning; remote issues may be limited or foreclosed entirely. See, e.g., Skinner v. Caldwell, 564 F.2d 1381, 1389 (9th Cir. 1977). In exercising discretion to limit questioning or foreclose testimony, the court must have a reasonable basis grounded in considerations of the factors set forth in the Rules of Evidence. The reasonableness of the ruling will clearly depend on how central the testimony is to the ability of plaintiff to prove his case.

In Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255, n.10 (1981), this court recognized that a Title VII plaintiff has a difficult burden to sustain, since a "satisfactory explanation by defendant destroys the legally mandated inference of discrimination arising from plaintiff's

initial evidence." The explanation of defendant, then, is clearly central to the success or failure of plaintiff's case. It is, therefore, a subject upon which wide discretion to cross examine should be granted.

In this case there was no other way to obtain the needed information, since the events from April 18 through April 24 are wholly based upon Lally's mental operations. This court has stated that "there may be some cases where the plaintiff's initial evidence combined with effective cross-examination of the defendant will suffice to discredit defendant's explanation. Texas Department of Community Affairs v. Burdine, supra at 255 n.10 (emphasis added). Here, cross-examination was really the only way to qualify, discredit or destroy Lally's direct testimony. Since Lally was the key witness for defendants, plaintiff's chance of prevailing rested almost exclusively on his ability to impeach Lally's version and credibility. Cf. United States v. Ketchum, 420 F.2d 901, 903 (4th Cir. 1969).

The trial judge precluded Shaheed's counsel, over objection, from inquiring into the events of April 18, April 21 and April 24. There was no basis for a finding that the evidence sought to be introduced was irrelevant, cumulative or prejudicial, nor did the preclusion follow any objection by defense counsel to the form and substance of the questions. After this preclusion, the court credited Lally's untested version of the events of those crucial days. All of the findings in the court's opinion concerning the

legitimate nondiscriminatory reasons were lifted from Lally's testimony. That testimony had, for the most part, never been subject to testing by cross-examination. 7/

The conduct of the trial court is prejudicial error and deprives plaintiff of an important federal right to due process of law. In Crandell v. United States, ___ F.2d ___ (4th Cir. 1983), the Circuit Court reversed the judgment of the trial court in a medical malpractice case because the judge had sua sponte prevented plaintiffs' counsel from cross-examination on the issue of causation. Slip opinion at 9. It was found that such conduct deprived the plaintiffs of the opportunity to prove their case. See also, Skinner v. Caldwell, supra at 1389; Teti v. Firestone Tire & Rubber Co., 392 F.2d 294, 299 (6th Cir. 1968).

The Third Circuit, by affirming the lower court's judgment, enunciates a rule that preclusion of cross-examination of a key witness, especially as it relates to the reasons for discharge, is permissible

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7/ Referring to testimony about the events of April 18 after plaintiff left work, the trial judge stated, "All I hear is the same story over and over, I only need to hear it once." A 55. Up to the point, the only time he heard that story was on Lally's direct examination. Yet he steadfastly refused to extend cross-examination to permit inquiry into this area.

as a matter of course in a Title VII case. This ruling removes from civil rights plaintiffs a major route, perhaps the only one in most cases, of disproving the articulated nondiscriminatory reasons for otherwise discriminatory actions. The writ of certiorari should issue so that this court can resolve this important issue of federal law.

III. THE COURTS BELOW DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT BY SETTING AN OVERLY LOW STANDARD FOR DECIDING THAT A CAUSE OF ACTION BY A CIVIL RIGHTS PLAINTIFF WAS SO FRIVOLOUS AS TO WARRANT AN AWARD OF ATTORNEY'S FEES

This court has established that the standard for awards of attorney's fees against a civil rights plaintiff in favor of a prevailing defendant under Title VII or 42 U.S.C. §1981 is that the claims must be frivolous, unreasonable or without foundation. Christiansberg Garment Company v. EEOC, 434 U.S. 412, 421 (1978); See also Hughes v. Rowe, 449 U.S. 5, 14 (1980). The trial court in this case set such a low threshold for finding the claim against defendant ALCOA to be frivolous as to exceed the grant of discretion. By doing so, the trial court's judgment defeats the overriding important goal of encouraging civil rights plaintiffs to vindicate the public interest, Christianberg Garment Company v. EEOC, supra at 420, and

does not serve the purpose of deterring vexatious lawsuits.

At the time it made its decision, the district court had before it plaintiff's facts alleging that ALCOA both acted as the agent of Adam Metal and assisted Adam Metal in making the decision to discharge plaintiff. (A 59-62) Adam Metal admitted that an ALCOA employee made the decisions at the EEOC Fact Finding Conference after which plaintiff was discharged. (A 4)

Under either Pennsylvania law (the locus of ALCOA) or New Jersey law (locus of both Adam Metal and the rendering of the assistance) the doctrine of respondeat superior imputes the wrongful acts of servants to their master, even where the wrong occurs while they are rending service to one not their master. Liability under this "borrowed servant" doctrine hinges on whether the allegedly harmful acts were performed within the general mission given the servant by the lending employer. Lazevnick v. General Hospital, 499 F.Supp. 146, 149 (M.D.Pa. 1980); J.L. Ouerner v. Safeway, 65 N.J. Super 554, 561 (App. Div. 1961), aff'd 35 N.J. 564 (1961). The mission of ALCOA's servants clearly encompassed involvement in the personnel decisions respecting plaintiff with an intent to benefit both Adam Metal and its parents, ALCOA. This raises the substantial question that ALCOA would be liable for discharge under traditional common law principles of vicarious liability for the purposes of the 42 U.S.C. §1981 determination. See General Building Contractors Assn. v.

Commonwealth of Pennsylvania, ___ U.S. ___ 102 S.Ct. 2515 (1982).

Title VII defines employer to also include "any agent" of the employer. 42 U.S.C. §2000e-1(b). The broad reading accorded this section is consistent with the intent of the statute that its remedial purpose not be frustrated by an employer's delegation of authority to third parties. City of Los Angeles v. Manhart, 435 U.S. 702 (1978).

Notwithstanding plaintiff's showing that ALCOA had lent its servants to Adam Metal and was acting as Adam Metal's agent, the district court failed to draw reasonable inferences in plaintiff's favor and, placing the burden on plaintiff to demonstrate an absence of factual issues, granted summary judgment to ALCOA on the first day of trial. Cf. Adickes v. Kress, 398 U.S. 144 (1970). Even if the lower court were correct in its grant of summary judgment, it does not follow that plaintiff's cause of action was unreasonable or without foundation. Plaintiff had a good and reasonable basis to believe that ALCOA bore direct responsibility, as ALCOA was present at the EEOC proceedings on the day of his discharge, and he had good reason to believe he was discharged for participating in the proceedings. [8]

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[8] At trial additional facts emerged that Adam Metal consulted ALCOA before deciding to discharge plaintiff and ALCOA "let" them proceed. A 51. The trial court failed to consider this. See A 39.

The district court's ruling required plaintiff to prove the decisive facts needed to prevail on the claim prior to the start of the trial or face paying defendants' attorney's fees. The standard that was applied is so low that it will "discourage all but the most airtight claims" and serve not to deter vexatious litigation but to chill plaintiffs from bringing potentially meritorious actions. See Christiansberg Garment Company v. EEOC, supra at 423.

The district court made no finding nor relied on facts to support a finding that the deterrent purpose would be fulfilled by its award. Indeed, the district court had already concluded that it was error for plaintiff's counsel to join ALCOA as a defendant. A 41 It is undisputed that plaintiff relied totally on the advice of counsel in joining ALCOA. A civil rights plaintiff's reliance on his trained counsel which results in filing a claim that does not succeed should not be lightly used to penalize him in the form of fees. See, e.g., Le Gare v. University of Pennsylvania Medical School, 488 F.Supp 1250 (C.D.Pa. 1980); Little v. Southern Electric Steel Co., 595 F.2d 998 (5th Cir. 1979). 9/

9/ The penalty aspect of the district court's decision on fees is highlighted by the fact that fees were awarded for all work (not just from the point that the court determined that the action was clearly frivolous) and that the court did not consider the relative impecuniousness of plaintiff, in arriving at the amount of the award.

The imposition of attorney's fees is a drastic remedy that should be reserved for cases in which the vexatious nature of the litigation has been clearly established. It is important that this court protect the access of civil rights plaintiffs to the courts by granting this petition to review an unjust imposition of attorney's fees.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

Paul Schachter

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Attorney for Petitioner

Dated:

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 82-5378

KHALIL T. SHAHEED,
Appellant

v.

ADAM METAL & SUPPLY COMPANY, KENNETH R. LALLY, indiv. and as President of ADAM METAL & SUPPLY COMPANY, and ALUMINUM COMPANY OF AMERICA
Appellees

On Appeal from the United States District Court for the District of New Jersey
(C.A. No. 81-1808)

Argued May 12, 1983

Before: ADAMS and WEIS, Circuit Judges, and VanARTSDALEN, District Judge*

JUDGMENT ORDER

After considering all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

/s/_____
Circuit Judge
ATTEST:

/s/_____
Sally Mrvos, Clerk

Dated: May 18, 1983

* Honorable Donald W. VanArtsdalen, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

KHALIL T. SHAHEED, X

Plaintiff, :

v. : No. 81-1808 (HCM)

ADAM METAL SUPPLY CO., et al., :

Defendants. :
X

OPINION

This Title VII case was brought by the plaintiff Khalil T. Shaheed originally against Adam Metal, Kenneth Lally and Aluminum Company of America. The case has already been dismissed as to Aluminum Company of America. Remaining are Adam Metal and the defendant Kenneth Lally.

The suit was predicated under Title VII of the Civil Rights Act of 1964, 42 USC Section 1981, the New Jersey Statute, N.J.S.A. 10:5-12(a), and the New Jersey common law public policy as enunciated in Pierce v. Ortho Pharmaceutical, 84 N.J. 58 and the Thirteenth Amendment.

It seems to me that about covers the possible waterfront of any claims the plaintiff could make in this court.

The claim, as I read it, is one for

retaliatory discharge. That is, a discharge effective April 21 of which the plaintiff was notified April 22, 1980.

It is claimed by the plaintiff that at that time he had a pending EEOC complaint which he had filed the previous September. His hearing, or fact-finding conference for that complaint, was to take place on April 21st. The decision to terminate him emanated from or was precipitated by events of April 18, 1980. The decision to terminate him was finalized following the EEOC fact-finding conference on Monday, April 21, 1980.

He claimed before the EEOC, and he claims here, that he was fired in retaliation for having filed that EEOC charge which ultimately was found to have no merit by the EEOC and was not the subject of a suit.

He bolsters his claim of retaliatory discharge by showing an employment history in which he claims he was discriminated against on a racial basis.

In this Title VII case plaintiff is obligated to make a prima facie case. He's got to prove he was engaged in a protected activity. He was--participation before the EEOC as a complaining party.

He has shown a second prerequisite, i.e., an adverse employment action that was contemporaneous with his EEOC complaint. And he has shown, in my judgment, I think as Mr. Rizzo concedes, a causal connection between the two on a prima facie basis.

These elements are set forth in Goodwin v. City of Pittsburgh, 480 FS 627, Western District

of Pennsylvania 1979, affirmed by judgment order 624 F2d 1090 (3d Cir. 1980).

Under this decision, if retaliation played a part even though it may not have been the sole reason for discharge, plaintiff has made a case entitling him to relief.

The criterion is whether the retaliation was a determinative factor not the determinative factor.

And as I said, it makes no difference whether there were other bases for the discharge if retaliation was a factor plaintiff is entitled to succeed.

I think that the plaintiff makes out his prima facie case by showing the proximal time relationship between the pendency of and activities on his EEOC case and his discharge. He also adds to that prima facie case by showing that in explaining the basis for his discharge Mr. Lally, the president of Adam Metal, referred to the lack of credibility in his opinion of a statement the plaintiff had made during the EEOC hearing.

In any Title VII case the defendant, such as Adam Metal, can rebut a prima facie case by showing a justification for the employment action on a permissible ground, i.e., firing for cause.

The plaintiff must then show that the proffered legitimate basis for discharge was pretextual. The defendant in my judgment, has advanced legitimate reasons based on plaintiff's employment file, including the arbitrator's finding, for discharging the plaintiff.

It is then the obligation of the plaintiff to refute this justification, showing that he was disciplined and discharged for offenses that non-EEOC employees were not. And he relies on Lally's remarks about plaintiff's credibility in the statements made at the EEOC hearing in trying to show pretext. First, defendants have demonstrated, I think, legitimate nonretaliatory reasons for discharging the plaintiff. At the time of his discharge Mr. Shaheed had been with Adam Metal for not quite eleven months, May 30, 1979 to April 21, 1980. The personnel record of Mr. Shaheed shows the following:

a) A written memo to the file indicating the plaintiff has an attitude problem and subject of complaints by other drivers, dispatchers and mechanics. There's also in the file a memorialization of an oral warning given the plaintiff after he argued with a customer about the return of a skid. This warning was apparently given on August 23, 1979, the date of memo. The memo was apparently given to the plaintiff on September 17, 1979.

b) There's a memo dated September 17, 1979, detailing a meeting on that date between the plaintiff, Robert Miller, the former immediate supervisor of the plaintiff, and Thomas DeMaio, at which time Miller verified plaintiff's understanding that he, Miller, had wanted to fire plaintiff for an incident of losing company checks but had reduced the discipline to a written warning at the urging of DeMaio and one Serio who was representing the union.

c) There's a written warning dated September 18, 1979 regarding plaintiff's loss

through plaintiff's admitted negligence in leaving his truck unattended of two checks made out to defendant in the total amount of $2,507.77, as well as the loss of signed delivery sheets and, additionally, the written warning refers to plaintiff's loss of his payroll check on September 10, 1979. Miller noted that it was a matter of concern to him that plaintiff should have two such incidents occur to him as a new employee and warned that another such incident would result in further action, including possibility of termination.

d) There are three notes in the personnel file detailing four occasions which plaintiff did not have sufficient dollars to cover his purchases of gas and had to borrow money from customers to cover the cost of gasoline purchases.

e) There's another memorandum in the file memorializing an oral warning to Shaheed on December 17, 1979 regarding his taking off of two sick days virtually upon the heels of his becoming eligible for sick pay after six months of service.

f) There's a memo detailing plaintiff's initial refusal to make a delivery from the defendant's Amityville facility until being told specifically to do so by Miller.

g) There's a memo suspending the plaintiff for two days for refusal to pick up metal from Busby Metals after Miller's direct order to do so and signing for the goods. That memo is dated February 15, 1980.

Even ignoring the references to a bad attitude, as noted by fellow employees, as too subjective a basis for discipline, the gas

incidents as caused by plaintiff not being told about the availability of advance dollars and the Amityville delivery incident as a legitimate query by plaintiff as to whether he was obligated under the CBA to make a delivery from that point; even ignoring all these disciplinary incidents, a picture still emerges of a careless, irascible employee who was no asset to the company and did not reflect well upon Adam Metal.

Even if it is true the plaintiff did not know about the skid return policy, this does not excuse his arguing about the matter with the customer known as Instrument Cases, or becoming abusive with that customer.

Similar argumentation and hostile contact was evidenced by plaintiff in his dealings with the Busby Metal customer in connection with plaintiff's refusal to pick up an order there, the event which led to his two-day suspension.

Although plaintiff alleges that the Busby people were "hassling" him, this is as irrelevant as his ignorance of skid policy with regard to the Instrument Cases incident. An employee must simply know that the customer is always right and that any dispute should be referred to his superior. In no event should an employee antagonize a customer as plaintiff did on both occasions, nor should it be necessary to apprise an employe of this basic maxim.

In any event, the Busby incident was the second one and particularly inexcusable since the plaintiff had already been employed for about ten months and had been warned about arguing with customers some six months before in connection with the Instrument Cases affair.

Plaintiff showed serious negligence in connection with his loss of the company checks and signed receipts. He simply had no excuse for leaving them unattended in his truck.

Miller, his supervisor, had wanted to fire him for that incident alone; union intercession reduced that to a warning.

Similarly, plaintiff's refusal to make the pickup at Busby was a refusal of a direct order from Miller and thus grounds for immediate discharge; plaintiff rather was only suspended.

Finally, the record also shows that shortly after becoming eligible for sick pay, plaintiff took two days off in late 1979. Despite a warning with regard to early abuse of such sick leave, which parenthetically was an acute concern of management given the large number of paid sick days available to drivers under their union contract, plaintiff proceeded to take some eight paid sick days between January 1, 1980 and his termination. Although it is true that the sick days were covered by Dr. Panzer's notes, did not result in any warnings, and plaintiff was seriously injured -- he had a gunshot, knife wound and trauma to the back in the course of a mugging in November 1979 -- they may still be probative of plaintiff's time cards indicate that he did not call in sick during any of the weeks immediately after his return to work following the mugging before he was eligible for sick pay.

It was Lally's uncontested testimony that according to Teamster practice, punching in and looking at one's manifest constituted an acceptance of the day's work. Leaving work

without taking out the run was thus a refusal of an order to work in Lally's estimation and grounds for immediate discharge.

This was supported by his conversation with the Teamster business agent from another local who stated that a course of action such as plaintiff's actions on the 18th of April, 1980, comprised a basis for discharge.

Lally testified that plaintiff's termination stemmed from a combination of the April 18th, 1980 incident and plaintiff's past poor record with the company. He asserted that, standing by itself, the 4/18/80 affair would probably not have resulted in plaintiff's discharge. His specific denial that plaintiff's participation in the EEOC played any part in his decision is credible in light of the factors stated to have been considered in the discharge determination.

In deposition testimony, Lally stated that he would not have terminated plaintiff if he had actually been ill on April 18, 1980, but that, in his judgment, plaintiff's allegations of illness were a fabrication, plaintiff simply not wanting to take a run he disliked on a nice Friday.

Plaintiff argues that defendant's failure to consult him before his termination demonstrates that defendant's disbelief in plaintiff's illness was not supported by evidence available to the defendant. Plaintiff also seeks to prove by testimony and his doctor's note that he was indeed sick that day. Even if plaintiff succeeded in this effort, it would not negate defendant°s assertion of legitimate reasons for plaintiff's discharge.

Whether plaintiff was in fact ill goes to whether his termination was for good cause, not whether defendant had a legitimate reason for discharging plaintiff on April 18, 1980.

The issue of good cause was addressed by the arbitrator who found against plaintiff. Although it is true that the arbitrator did not consider the issues before the EEOC, he did specifically find plaintiff's assertion of illness unbelievable in light of Panzer's ambiguous notes and testimony as to plaintiff's distaste for the New York City run.

If defendant's belief that plaintiff was feigning illness was proven wrong, Lally would have rehired him. Such a wrongful belief would not, however, prove that Lally did not have a legitimate reason for discharging plaintiff when he acted on the basis of information he then had.

Lally made a credibility determination regarding plaintiff which he certainly was entitled to make; it does not appear that he was required to provide plaintiff with a trial type forum before making that determination. Ascertaining the accuracy of that determination was the arbitrator's task and it was before him that plaintiff could present evidence that Lally's credibility determination was wrong.

In determining that plaintiff's assertion of illness was false, as of April 18, 1980, Lally relied on the following:

a) A statement by a company employee named Magyarits that he saw plaintiff look at his manifest, put it down on the table, speak to DeMaio and Muciaccia, who was the receiving clerk,

and then leave; Magyarits' additional statement that DeMaio, who died that weekend, without ever speaking to Lally, to him, that is, told Magyarits, that plaintiff had told DeMaio that he, the plaintiff, did not want to take the New York city run, and was going to take a sick day.

b) Plaintiff's taking sick days soon after becoming eligible for sick pay.

c) The number of sick days plaintiff had taken up to April 18, 1980 after being warned about early use of sick days.

d) The two incidents of plaintiff's arguing with customers as to which plaintiff had a different version of the events than did the customers.

e) The written note of March 13, 1980 memorializing a phone call by a Mr. Lovelidge employed by the plaintiff to Dr. Panzer which noted that Dr. Panzer was evasive in his answers to questions about plaintiff.

f) Stories attributed to plaintiff about mechancis not fixing his truck. And,

g) Conceivably, plaintiff's testimony at EEOC about cat urine and defication in his truck, although defendant maintains that this came up only after plaintiff produced Dr. Panzer's note at the April 24 meeting; even if this testimony were considered, it does not lead to a conclusion of retaliatory discharge.

As to the truth of plaintiff's claims about cats being locked in his truck so they could urinate and deficate in there, and make life

unpleasant for him, the evidence was in sharp conflict as to whether someone seeking to contaminate plaintiff's truck would know beforehand which truck plaintiff would be driving. This is particularly true since the plaintiff filled in for absent drivers and did not always have a regular route. Whether a cat could be confined within a given truck is also an open question since the trucks were constantly being moved about at night during the loading process.

Plaintiff claims that he was always given the same truck. I also examined the manifest and that's not true. He drove different trucks, although one truck seems to have been driven by plaintiff more than the others. I believe it's No. 562, if I recall correctly.

Lally testified to his understanding of the truck driver work assignments, and that understanding, if Lally is correct, would preclude the possibility of plaintiff's truck regularly being the subject of housing felines at night. And that would provide Lally with a rational basis, even if he was mistaken, for discrediting plaintiff's veracity about the cat story.

In any event, the stated reason for having the cat in the warehouse in the first place, was to keep the rodent population under control; locking them in a truck all night is certainly inconsistent with that purpose.

No defense witness specifically challenged plaintiff's testimony that he was always given the same truck. If he did not, for plaintiff to have gotten a truck in which cats have been confined at night would require that the perpetrators were always aware of who would be out on that truck the

next day. Furthermore, plaintiff's assertion that he always operated the same malodorous truck is difficult to credit as it seems to me incredible anyone would load someone's truck and then, after learning that that driver wouldn't be in, unload it and reload the goods in the plaintiff's truck just to make sure the plaintiff drove an aromatic vehicle.

In addition, Lally's explanation that the trucks were constantly being shuttled about and and that thus no cat could be penned up in one all night, seem credible.

Therefore, if need be, a finding that plaintiff was mistaken about the cat story is in order. Something like that may have happened once or twice, but I find it entirely incredible that it happened on a regular and recurring basis.

It seems to me that Lally was justified in assessing plaintiff's credibility the way he did and in concluding the plaintiff was not ill on April 18.

On the basis of the finding that plaintiff was not ill, Mr. Lally could conclude, as he did, plaintiff walked off the job and, hence, had refused the company order to take out the load and was, therefore, subject to immediate discharge.

On the basis of a finding that plaintiff had refused a company order coupled with plaintiff's shabby work record compiled in only eleven months, defendant has demonstrated a legitimate, non-retaliatory reason for plaintiff's discharge. At this stage then we have to go to the proposition as to whether the plaintiff has shown that these reasons proffered by the defendant were a

pretextual reason for a retaliatory or racial discharge.

I find that plaintiff has failed to demonstrate by a preponderance of the evidence that defendants' legitimate non-retaliatory reasons for discharging him were pretextual either, one, by relying on Lally's statements regarding plaintiff's testimony at the EEOC fact-finding hearing or, two, showing that plaintiff was disciplined for offenses others were not, or three, showing that plaintiff was discharged for infractions that others were not.

I'll deal first with Lally's remarks regarding the EEOC testimony.

The secondary usage of the EEOC participation involved here does not appear to be the sort of retaliation which at least one court found to be a violation of 704 (a), even assuming the employer acted in good faith.

The case relied upon by the plaintiff involves an employee filing what the employer believed to be false and defamatory accusations against it, thus, the defendant argue that it discharged the plaintiff not merely because the employee filed an EEOC complaint but, rather, because the complaint contained allegedly false and libelous statements regarding the employer.

It was in this context that the Court held an employer's good faith belief in the falsity of an employee's accusations does not comprise a justification for the discharge of that employee.

That case is Pettway v. American Cast Iron Pipe Company, 411 F2d 998, (5th Cir. 1969).

Plaintiff also cites to the Court Mead v. U.S. Fidelity & Guaranty Co., 442 FS 114 (D. Minn. 1977). That case states that a defendant's protestations that it had not intended to discriminate is not availing when a natural consequence of its action was discouragement toward employees from exercising their rights under Title VII. This was said, however, in the context of the question whether specific evidence of intent to discriminate was required to show a Section 704(a) violation has little bearing on the specific argument advanced here by plaintiff, i.e., Lally's reference to Shaheed's EEOC testimony.

Here the asserted reason for Shaheed's discharge was not that he had slandered the defendant or that he had lied at the hearing but rather his refusal of a work assignment on April 18, 1980, coupled with his overall poor record.

Defendants do not assert, as the defendant did in Pettway, that they fired Shaheed for, in essence, the fact of his having made allegations to the EEOC; rather, Shaheed's statements were utilized in connection with his discharge, if at all, solely as they bore upon his credibility in an unrelated matter.

Thus, it can hardly be said that in relying on Shaheed's statements to make an unrelated credibility determination, defendants retaliated against plaintiff in discharging him. Defendants could legitimately have made the same use of Shaheed's statements if made to them informally in private; it does not appear that a statement becomes absolutely privileged for all purposes under 704(a) merely because it is made in

connection with an EEOC proceeding. I cite generally Hochstadt v. Worcester Foundation, 545 F.2d 222, 230-33 (1st Cir. 1976) for the analogous proposition that not all forms of employee activities are immunized under 704(a) merely because allegedly made in opposition to discriminatory employer practices.

As an example, suppose an employee states under oath at an EEOC hearing that he has stolen large sums of money from his employer. Should the employer then be precluded from firing the employee not because of his participation at the EEOC but because of his admission of theft?

In addition to the foregoing discussion, defendants contend that they did not retaliate against Shaheed for his EEOC statements because the decision to terminate plaintiff had been effectively made by Lally on the preceding Friday, April 18, 1980, subject only to verification of plaintiff's having looked at his delivery assignments before departing work that day.

Lally testified that on April 18, 1980:

1) He was told in the morning by either Mucaccia, O'Shea or Ruiz, all Adam Metal employees, that plaintiff took a sick day after punching in and also that some drivers had seen plaintiff look at his run before saying he was sick.

2) He spoke with one Larry Gilbert, a business agent for one of the locals representing defendant employees, and was told that if plaintiff had indeed done what was ascribed to him, this would justify his immediate discharge.

3) He examined plaintiff's work file in toto for the first time.

4) He wrote a letter to plaintiff and sent a copy to plaintiff's union, stating that plaintiff was under investigation for his action on April 18, 1980, and that suspension or termination might follow.

Plaintiff was given a copy of this letter on his next day of work, April 22, 1980. Lally testified that it was the defendant's practice to hand deliver such letters to employees. An examination of other disciplinary letters, most of which bear handwritten notations that they were shown to the employee in question, verifies Lally's testimony in this respect.

5) Lally attempted to verify the assertion that Shaheed had looked at his run sheet before leaving sick but was unable to locate a driver on April 18 who could so attest to that.

Furthermore, by plaintiff's own testimony, he was informed by the EEOC on the date of the hearing, April 21, 1980, that he was under investigation by Adam Metal and could be subjected to disciplinary action.

Lally testified that defendant's attorney told the EEOC before the conference started that plaintiff was being investigated for the April 18, 1980 incident and could be discharged.

Lally also testified that he had refrained from firing other employees when he could not get a witness who would testify that he witnessed the alleged infraction.

Lally also stated that he would not fire someone unless he thought he had at least a fifty percent chance of winning the ensuing arbitration.

When Mr. Lally spoke with William Magyarits, a truck driver, in the late afternoon or evening of April 21, 1980, after the EEOC hearing, and Magyarits stated that he had seen plaintiff look at his manifest before reporting sick on April 18, 1980, Lally finalized Shaheed's discharge and wrote the termination note given the plaintiff the following day.

Thus, the decision to terminate plaintiff flowed not from his statements to the EEOC but from the availability of a witness who could verify that plaintiff looked at his manifest.

Had Lally spoken to Magyarits on April 18, 1980 prior to the EEOC hearing, in my judgment plaintiff would have been discharged at that time.

The preceding discussion and evidence adduced demonstrates that Shaheed's testimony at the EEOC hearing either, 1) was not a cause of plaintiff's discharge or 2) even if considered in connection with his discharge was not cause of such testimony as would comprise a retaliatory termination.

It also should be noted that plaintiff contends that his discharge and the disciplinary actions preceding are all in retaliation for plaintiff's resort to the EEOC. The chief claim, however, and the one which was the subject of plaintiff's motion for partial summary judgment, was that Lally had fired plaintiff in retaliation for his testimony at the EEOC fact-finding hearing.

Thus, the rejection of this claim as outlined above goes a long way toward defeating plaintiff's allegations of retaliatory action on defendant's part. Since more general claims of such action remain, however, discussion follows with regard to plaintiff's other claims of pretext.

I find plaintiff was not disciplined for infractions other employees were not disciplined for.

Plaintiff contends that the record of plaintiff's shabby performance which defendants pointed to in discharging him, was itself the result of retaliatory treatment designed to build just such a record justifying termination. This follows from the allegedly different discipline meted out to other non-EEOC complaining workers.

This plainly is not so.

Now, I have to note that it is somewhat difficult to determine from the employee records whether someone was not disciplined for committing the same offense for which plaintiff was disciplined since, obviously, there would be no record of discipline not meted out.

The reverse, that is, evidence of discipline given other workers for similar offenses, would tend to negate plaintiff's claims. The records were examined for evidence of similar offenses.

In addition, plaintiff made some accusations from his personal knowledge that some other employees were not disciplined as he was. I'll examine these in order.

Number one, the plaintiff received a warning

for arguing with customers. Another driver, Robert Roberts, was investigated for having used foul language to a customer, a comparable offense. Since defendant's contact with the customer did not verify the accusation, he was not formally warned with regard to it.

By his own admission, Roberts did engage in some horse play at the customer's place of business, and was warned about this, and was told that a repetition of such acts could lead to a suspension or discharge.

Second, plaintiff received a warning for allowing company checks and signed delivery receipts to be stolen from his truck. Roberts committed comparable infractions in failing to have all his delivery receipts on August 10, 1981, and in failing to pay proper attention to the security of some metal he picked up on August 14, 1981, resulting in its loss or theft.

For these infractions, Roberts was suspended on August 25, 1981 for a period of thirty days, (a more severe punishment because of the actual loss to the company).

The date of Roberts' suspension is noteworthy since plaintiff claims that his warning for his similar offense should be discounted because it was given him more than seven days after the infraction, and that this delay also indicates its retaliatory nature since plaintiff made his first EEOc charge during the interim.

I might note that the Teamsters Master Freight Agreement in Article 47, provides that no disciplinary letter or suspension shall be valid unless given within seven days, exclusive of

weekends, of the employer acquiring knowledge of the infraction.

However, Roberts here was suspended in part because of the August 10 incident which is more than seven days before the August 25th suspension. With regard to the August 14th incident, it was apparently timely since August 14th was a Friday.

This Roberts delay indicates that defendant may not always have complied with the seven-day rule. And, thus, did not particularly extend the time for punishing this plaintiff.

That such delays may have been commonplace also undercuts plaintiff's contention that his warning came as a result of his EEOC charge. Additionally, whether defendants may have imposed discipline in violation of the Master Freight Agreement may have had an impact on whether plaintiff's discharge was for just cause but that was a question for the arbitrator who upheld the discharge. The imposition of discipline here is probative, even if technically invalid, of defendants' legitimate reasons for terminating plaintiff. This is especially true when it is clear that other non-minority, non-EEOC complaining drivers also received such allegedly invalid discipline.

Finally, the circumstances of the Roberts incident--discipline resulting not immediately after a first infraction but soon after a second quickly follows the first--buttresses the inference that it was the combination of plaintiff's warning letter states that Miller was concerned two such incidents should befall a new employee.

Lastly, the delay in defendant's disciplining of plaintiff for these incidents may also be attributable to the fact that Miller wanted to fire plaintiff for them and the union's intercession which caused discipline to be reduced to a warning. The union's intercession and the change of Miller's initial decision what to do about these incidents, may well have been a significant factor in creating the delay.

Third, plaintiff received a warning for early use of sick days. He took two sick days soon after being eligible for sick leave. And Lally testified that plaintiff's eight sick days in the first three months of 1980 was excessive and a factor in judging plaintiff's claim of illness on the 18th of April.

An employee named James Mara received a warning for having been out eight times in six months, and told all future absences will be thoroughly investigated and would have to be accompanied by a doctor's note.

It should be noted at the time Mara was disciplined, he had been an employee for two year and thus eligible for sick pay for one-and-a-half years.

Fourth, plaintiff received a two-day suspension for refusing Miller's direct order to return to Busby Metals to Pick up some metal bars. Apparently the only other employee to be disciplined for failing to obey a company order was a warehouseman named W. Raper who refused to fill out a production form. His refusal resulted in a warning letter; the ultimate resolution of the situation is not clear.

It should be noted that at the time of the Raper incident, Raper was a fifteen-year veteran of employment at Adam Metal whose record reflected only one form warning about excessive absence and tardiness, given in Raper's tenth year.

I also infer from the records before me that many warehouse employees were given form attendance warnings of the nature Mr. Raper got. We have no incidents before the Court of any other employee receiving a sick day warning after taking two sick days off virtually upon the heels of becoming eligible for sick leave. This doesn't really prove anything. Such an incident may not have occurred with any other employee.

In any event, it is clear that management was concerned with absenteeism on the part of all its workers and expressed such concern with regard to one of plaintiff's fellow drivers. Also, the discipline plaintiff received for this abuse was very mild, only an oral warning, and he was apparently paid for the two sick days.

Defendants, I emphasize, had a legitimate special concern as to the drivers because of the liberal sick pay provisions for them, and in light of that it seems to me that more pronounced reaction to a driver's use or abuse of sick days is justifiable as distinguished from the reaction of a warehouseman who only had a limited number of sick days. These disciplinary actions were focused upon by Lally in his description of what prompted him to fire this plaintiff.

As to the comparisons I have referred to, it shows that the discipline meted out to the plaintiff for these incidents were not out of line with that given other employees for similar

events. Thus, it cannot be said that the discipline plaintiff was subject to was itself pretextual or designed to build a record against plaintiff.

Plaintiff also asserts that he was discharged for infractions for which others were not discharged. I find this not to be so.

Plaintiff urges the Court to compare his behavior on April 18, 1980 with that displayed by other employees on other occasions whose transgressions were as severe or worse and who were not terminated.

This is not the proper inquiry, however, since Lally's testimony establishes that plaintiff was fired for the events of April 18, 1980 in light of his entire work record. Thus, to genuinely find disparate treatment, we would have to compare plaintiff with an employee who committed a similar offense and who had a similar work record as a whole.

In addition, factors such as length of service may come into play. Just because an employee commits an offense for which he may be immediately discharged does not, of course, mean that he must be fired. An employer has discretion in such decisions and may exercise it as long as he does not do so on the basis of impermissible factors.

Finally, there may be differences between warehousemen and drivers making comparisons between the two meaningless. For instance, it may be easier to get truck drivers at the salary defendant pays than to get warehousemen and, thus, more misbehavior will be tolerated on the part of

the latter.

With these considerations in mind, plaintiff's alleged instances of non-termination of others for similar or more egregious actions will be examined.

1) Plaintiff testified that Mr. DeMaio, a driver, had a least once punched in, looked at his manifest and left claiming illness without being terminated. Plaintiff advances a similar claim as to driver Sal Patti, but this will be disregarded since he could not state wih certainty that Patti looked at his manifest.

Plaintiff testified that this took place in July 1979; DeMaio's time cards apparently indicate that DeMaio was out the last week of July.

At the deposition, Lally adverted to a period of time during which DeMaio was hospitalized and in traction for back problems. I do not know whether DeMaio was hospitalized in July of 1979. That is not clear. But if he had been, then clearly his leaving work, even after looking at his manifest, would have been acceptable, as it would have been on the part of plaintiff had the plaintiff been hospitalized on April 18, 1980.

More to the point, Lally testified at the trial that, his hospitalization aside, DeMaio was an average employee, his records do not disclose any disciplinary action against him.

In addition, 1979 was DeMaio's fifteenth year at Adam Metal; even if he had not been legitimately ill in July, such lengthy service might reasonably form the basis for less severe discipline than discharge for someone with an

acceptable record.

Furthermore, Demaio was shop steward; rightly or wrongly, that position may, as a practical matter, dictate cautious action in disciplining such a key employee.

Most importantly, plaintiff's testimony gave no indication that anyone had brought the matter to management's attention as various employees had in the case of this plaintiff. Thus, there may have been no trigger for any action whatsoever until the matter was raised by plaintiff, at which time DeMaio was dead.

DeMaio's time card for April 1, 1980 shows a punch in -- this is a different day we have been referring to now -- no punch out. And the notation "sick day", initialed Jack Mucaccia.

Lally's deposition introduced by plaintiff refers to this. This may be what plaintiff was referring to, I do not know.

In any event, it's there by, of course, there has been no testimony that anyone saw DeMaio punch in that day, or look at his manifest. And there's also no evidence that DeMaio was not obviously ill on that day, such as vomiting, sweating, breathing hard, whatnot. He may have had obvious indicia of illness on April 1, 1980. The plaintiff did not have obvious indicia of illness on April 18, 1980.

Also, the driver, James Mara's time card for November 7, 1979, indicates that he punched into work and went home sick and was paid a sick day. The same inferences could be drawn from the facts about Mara on November 7, 1979.

If management believe that Mara was actually ill and didn't fire him, there is no inconsistency with disbelieving plaintiff and firing him.

The problem with the Mara incident is that Mara has a bad record, including discipline for abuse of sick days and leaving work to attend to personal business.

On the positive side, November 7, 1979 predates any discipline against Mara and thus defendants have no basis in Mara's record to doubt his allegation of illness as they did in plaintiff's case.

Additionally, Lally testified here that based on his record, Mara's next infraction would probably be his last at Adam Metal.

Lastly, the Mara time card notation was made at the time when Mara had already been an apparently satisfactory employee for two years rather than plaintiff's eleven months. It should be noted again that plaintiff's time card incident came at the end of his record of misbehavior. Not at the beginning of it.

Plaintiff also contends several warehouse employees committed infractions like the plaintiff's, which were grounds for immediate discharge without being discharged. I've already pointed out that the evidence regarding this different class of workers may be subject to some infirmities insofar as the probative value of this evidence is concerned. However, plaintiff raises the following: One Milt Simmons was reported to his superiors by one John Perjatel, night foreman, on November 21, 1979, and June 10, 1980, for being drunk in Perjatel's opinion.

As far as his record shows, no discipline was imposed, and indeed, Perjatel recommended that Simmons be paid for one of the days.

There are some distinguishing characteristics. Simmons was hired on October 19, 1959, and thus was in his twentieth year at the time of the first incident. Although grounds for immediate discharge in any event, drunkenness may be of less consequence in a warehouseman than a truck driver for obvious reasons, and thus discipline may be less necessary.

One Stan Canady was noted as being drunk, according to his supervisors, on March 14, 1979, November 21, 1979 and July 10, 1980. He was given a verbal warning regarding drinking on July 14, 1980, and a letter of the same date indicating that this would be his last warning, and that any further drinking would meet with disciplinary action.

There are distinguishing characteristics. Canady was hired October 27, 1958, and, thus, in his twenty-first year at Adam Metal when first reported as drunk.

Also I have to add that whether a person is drunk is very often a subjective judgment and an opinion on the part of someone who observes him, and may be very difficult to prove.

I recall Mr. Lally's statement that he would not fire an employee unless he had evidence that he thought would give him a 50/50 chance of winning an arbitrtion.

One Mike Hopkins was fired on August 16, 1979

for having been drunk at work, becoming abusive when told to leave, threatening a foreman and his family, knocking over a locker and breaking a glass window, all on August 10, 1979.

From this plaintiff apparently wishes to show that discharge is reserved only for extreme cases of employee misconduct, misconduct much greater than plaintiff's.

On the other hand, a different conclusion may be drawn; namely, the discharge was not a form of discipline reserved for plaintiff, that defendant would utilize discharge when it was called for.

More compelling is the distinguishing characteristics here. Hopkins was hired on May 28, 1979, mere three months before he was fired. Thus, in connection with these drunkeness offenses, a reasonable pattern emerges. Defendants would go easy on very long term employees while showing little tolerance for such an offense in a new employee. This is a logical and understandable differentiation. Who wants to hurt an old co-worker unless absolutely necessary, an experienced employee whom the defendant has presumably invested money in terms of training, et cetera, over the years, and who presumably knew his job well?

Conversely, who wants to allow to stay on someone who has shown he is trouble soon after being hired? Unfortunately for the plaintiff he falls into the latter category.

Hopkins' discharge is, thus, consistent with plaintiff's and bolsters the legitimacy of it.

Indeed, when it is remembered that plaintiff

could have been discharged for the Busby Metals incident, i.e., refusing to pick up the metal bars, and was only suspended for two days, in the ninth month of his employment, it appears that plaintiff was, if anything, treated a little more leniently.

The foregoing demonstrates that plaintiff has failed to prove that he was treated differently from other employees when all surrounding circumstances are taken into account.

In particular, although plaintiff has shown that other employees were not terminated for infractions that, like his, would sustain an immediate discharge, these non-terminations are justifiable on legitimate grounds.

Also, for reasons discussed above, Lally's reference to plaintiff's EEOC testimony does not comprise direct evidence of retailation. Having been unable to prove that defendants' legitimate justification for his termination was pretext by failing to show that his underlying discipline and discharge was pretextual, plaintiff has also failed to prove that he was discharged in retaliation for his EEOC complaint or anything that he said before the EEOC.

There's also been a Title VII racial discrimination case. I might as well cover that as long as I'm about it.

In Whack v. Peabody, 595 F.2d 190 (3d Cir. 1979), the Court stated that there are no hard and fast rules as to what evidence comprises a prima facie discrimination case, there, is a racial discharge case.

The Court did not, however, that usually some showing must be made that plaintiff was treated differently from similarly situated non-minorities. District courts in this Circuit have thus come up with a variety of formulations for a prima facie case involving discharge.

In Oshiver v. Court of Common Pleas, 469 FS 645, 649, (ED Pa 1979), the following formulation was stated: First, plaintiff must be a member of a protected class; second, qualified for a job; third, discharged; fourth, non-members of protected class continued to work at same type of job plaintiff had held.

Leftwich v. U.S. Steel Corp., 470 FS 758, 764, (WD Pa 1979): 1) member of protected class, 2) subject of adverse employment action, 3) casual relationship between membership in class and adverse action.

Depending on what formulation is adopted, plaintiff here may or may not have made out a prima facie case. Even assuming that he has, it is clear that as a plaintiff in a disparate treatment case, plaintiff must prove both the existence of disparate treatment and also that such treatment was caused by purposeful or intentional discrimination. Smithers v. Bailar, 629 F.2d 892, 898 (3d Cir. 1980). Here plaintiff has presented absolutely no direct evidence of a racial animus leading up to his discharge. Given defendants' legitimate explanation of plaintiff's discharge, plaintiff must prove that in his discharge, or disciplinary record leading up to it, he was treated differently from white employees.

Assuming that all the employees discussed in

the preceding section are white, I know that all the other drivers but one are, I'm not confident about the warehousemen, the discussion therein precludes such proof by plaintiff.

In this connection, Leftwich states that, "The fact that other white employees (who were also guilty of tardiness) were not also discharged does not establish that the defense is a pretext where none of those employees had a disciplinary record comparable to plaintiff's." 470 FS at 766.

The only driver whose record is close to plaintiff's is James Mara. Mara has already been suspended and Lally testified that his next mistake would be his last for Adam Metal.

Plaintiff here has ultimately failed to show disparate treatment as required by the Third Circuit. Whether plaintiff has made out a prima facie case will depend on how strong a showing of same one wants to require in the prima facie case. Plaintiff's prima facie evidence appears to consist solely of his discharge as a black and the non-discharge of fellow white drivers. Thus, plaintiff has either failed to make out a prima facie case or, alternatively, falied to carry his burden of proof that his discharge was caused by purposeful or intentional discrimination.

Defendants provided a legitimate, nondiscriminatory reason for plaintiff's discharge, rebutting whatever prima facie racial case plaintiff had.

Plaintiff has already failed to show that the reason is pretextual. The failure applies to the racial discrimination claim as well.

The finding that defendants raised a legitimate reasons for firing plaintiff which was not pretextual was based on determinations that defendants had treated plaintiff in a legitimately different fashion for disciplinary and discharge purposes. This should preclude any other claim of disparate treatment in connection with racial discrimination.

In short, in his Section 704(a) claim, plaintiff had only argued pretext because the other workers had not filed EEOC complaints; now, it would only be because they were not black. The same findings of legitimate differences or no differences in defendant's handling of plaintiff should apply equally here; no further evidence of racial discrimination is given other than plaintiff's own race.

Now, plaintiff has a 1981 claim under 42 USC Section 1981. The Third Circuit has recently held that 1981 reaches only purposeful discrimination and that discriminatory intent must be shown in a 1981 case. Croker v. Boeing, 662 F.2d 975, 988-89 (3d Cir. 1981).

I think that in light of the Croker case, what I've already said about plaintiff's Title VII claim, a fortiori, disposes of the 1981 claim.

Also, plaintiff makes a 13th Amendment claim. If there is a direct action under the 13th Amendment, which I don't think ultimately will be sanctioned by the Supreme Court of the United States, again I think that what I've said about the Title VII case would certainly dispose a fortiori of any action that may arise directly under the 13th Amendment, although I doubt that one does. Plaintiff, as I also pointed out, sues

under N.J.S.A. 10:5-12(a). That's identical to Title VII.

As to the order of proof and the requirements for a prima facie case, Peper v. Princeton University Board of Trustees, 77 N.J., Rutgers, 155 N.J. Super 232, 237-38 (App. Div. 1977). Again, what I've said about plaintiff's federal Title VII case disposes a fortiori of his New Jersey claims under N.J.S.A. 10:5-12(a).

As I mentioned before, plaintiff also sues under Pierce v. Ortho Pharmaceutical, 84 N.J. 58 (1980). I don't know whether one would have a cause of action under Pierce if the cause of action were covered by the statute N.J.S.A. 10:5-12(a).

Insofar as Pierce might be applicable, what I've already said about Title VII federal cases disposes of that claim as well.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

KHALIL T. SHAHEED,	:	
	:	
Plaintiff,	:	Civil Action No. 81-1808 (HCM)
-v-	:	
	:	
ADAM METAL & SUPPLY COMPANY, KENNETH R. LALLY, individually and as president of Adam Metal & Supply Company, ALUMINUN COMPANY OF AMERICA,	:	SUMMARY JUDGMENT IN FAVOR OF DEFENDANT ALCOA
	:	
	:	
Defendants.	:	

This action came before the Court, Honorable H. Curtis Meanor, United States District Judge, presiding, on the Motion of defendant Aluminum Company of America for summary judgment in its favor as to all causes of action alleged against it together with counsel fees incurred by the said defendant, and the Court having considered the moving papers and Memorandum of law sumbitted (sic) by the said defendant as well as plaintiff's Affidavit in opposition thereto and oral arguments of counsel, and a decision having been duly rendered, and for good cause shown:

It is ORDERED AND ADJUDGED that summary judgment of No Cause of Action be and hereby is

entered in favor of Aluminum Company of America, together with counsel fees in the amount of $3,806.50, and costs of suit.

Newark, New Jersey
Dated: April 8, 1982

/s/ _____
H. CURTIS MEANOR
U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

KHALIL T. SHAHEED,	:	
	:	Civil Action No.
Plaintiff,	:	81-1808 (HCM)
	:	
-v-	:	JUDGMENT IN FAVOR
	:	OF DEFENDANTS ADAM
ADAM METAL & SUPPLY COMPANY,	:	METAL & SUPPLY
KENNETH R. LALLY, individually:		COMPANY AND
and as president of Adam Metal:		KENNETH R. LALLY
& Suply Company, ALUMINUM	:	
COMPANY OF AMERICA,	:	
	:	
Defendants.	:	

This action came on for trial before the Court, Honorable H. Curtis Meanor, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered, and for good cause shown:

It is ORDERED AND ADJUDGED that a judgment of No Cause of Action be and hereby is entered in favor of Adam Metal & Supply Company and Kenneth R. Lally, defendants, and against Kahlil T. Shaheed, plaintiff, together with costs of suit.

Newark, New Jersey
Dated: April 8, 1982

/s/ _____
H. CURTIS MEANOR
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KHALIL T. SHAHEED,	:	
	:	
Plaintiff,	:	Hon. H. Curtis Meanor
-v-	:	Civil No. 81-1808
	:	
ADAM METAL AND SUPPLY CO., et al.,	:	
	:	ORDER
Defendants.	:	

This matter having come before the Court on motion of the plaintiff pursuant to Federal Rule of Civil Procedure 59(e) for amendment of judgment against plaintiff for Aluminum Company of America, entered on April 8, 1982, in the form of relief from the award of attorney fees against plaintiff, or in the alternative an abatement of the amount awarded, and the Court having considered the moving papers of the plaintiff and the papers in opposition to the motion submitted on behalf of defendant Aluminum Company of America, and the Court having heard oral argument in open court on May 10, 1982, the Rutgers Labor Law Clinic (by Denise Reinhardt) appearing on behalf of the plaintiff and Stryker, Tams & Dill (by John J. Rizzo) appearing on behalf of said defendant and for good cause shown:

It is on this 20 day of May, 1982,

ORDERED that plaintiff's motion be and the same is hereby denied.

IT IS FURTHER ORDERED that counsel for the defendant John J. Rizzo, submit to the Court no later than three days after the entry of this Order an Affidavit to supplement an Affidavit filed with the Court on March 30, 1982 which said supplemental Affidavit shall set forth further background facts regarding the experience of counsel and shall set forth an identification of dates of services rendered with respect to services rendered on behalf of defendant Aluminum Company of America as set forth on Schedule A of the aforesaid Affidavit of March 30, 1982.

/s/ H. Curtis Meanor

H. Curtis Meanor DATE:

EXCERPTS FROM THE TRIAL TRANSCRIPT

Transcript: Volume 1, page 24-25

THE COURT: In fact, I don't think you can show a connection between Alcoa and this case in the fact that house counsel for Alcoa also represented Adam Metal, that's not enough. All right.

There are about 15 reasons that Alcoa should no longer be in this case.

First, it's not liable under Title VII at all. Second, there is no prima facie case against it under 1981. There's not a shred of evidence anywhere in the pile of paper in this rather simple case has generated that would indicate in any way that Alcoa bears direct responsibility or indirect responsibility for the firing of the plaintiff.

There is no relief that the plaintiff can get against Alcoa that is not available to the plaintiff against Adam Metal.

What is wanted is apparently a declaratory judgment about Alcoa. This Court is not in the business of engaging in hypothetical litigation. Declaratory judgment will add nothing to the plaintiff's rights, just gives him another piece of paper.

Declaratory judgment is a discretionary remedy, and where it serves no purpose I'm not about to entertain it.

You may have your dismissal with prejudice as to Alcoa.

MR. RIZZO: Thank you, your Honor.

THE COURT: You have an application for fees and costs, let that abide the event of the rest f the trial.

Transcript: (Shaheed-Direct) Volume 1, page 109

Q. You were telling us about a conversation that you had with Mr. Miller on Thursday, September 13th. Would you tell us what you said to Mr. Miller and what he said to you?

A. I went to Mr. Miller about my paycheck and I had asked him would he reimburse me another check. And he told me that he couldn't give me another check until after he found out whether or not I had cashed it.

Q. Did he say whether or not you had cashed it or whether or not it had been cashed?

A. No, he said that he wanted to find out whether I cashed it.

Q. What, if anything, did you say to him?

A. I told him that it wasn't right--he also stated that he was going to hold the check for seven days to find out whether I had cashed it. And I had told him that I had rights and he couldn't hold the check for seven days.

And he insisted that he could. And I told him that I was going to go to the Human Rights Commission about it.

Q. Did you tell him why you were going to the Human Rights Commission?

A. Yes.

Q. What did you tell him?

A. For implying that I had cashed the check.

Q. Did anything else take place in that conversation?

A. No.

Q. After that conversation did you in fact go to the Human Rights Commission or any other government agency?

A. I went to the EEOC.

Q. Where?

A. In Newark.

Q. When did you go? Was that the same day?

A. I believe so. I went twice.

Q. What happened the first time you went there?

A. I believe I was a little late getting there. And they had to pick up the proceedings that Monday, which was the 17th.

Transcript: (Shaheed--Direct) Volume 2, page 15 to page 18.

Q. Prior to your receiving this letter, had anyone from the company asked you about your actions on the morning of April 18th?

A. No, they didn't.

Q. What happened after you received these letters?

A. I was instructed by the dispatcher to see the union representative.

Q. Did you see the union representative?

A. Yes, I called.

Q. And what happened?

A. They set up an appointment with Mr. Lally. I believe it was April 24th.

Q. Yes.

A. And we had a meeting. You want to hear about the meeting?

Q. Yes. I would like to hear about the meeting. Who was present?

A. Mr. Harry Serio, union representative, and Leon Barone, acting shop steward, and also Mr. Lally and myself.

Q. Approximately what time of day did this meeting start?

A. I believe it was 9:00 or 9:30 that morning.

Q. And where did it take place, if you remember?

A. In Mr. Lally's office.

Q. Would you tell us as exactly as you can remember what, if anything, was said at that meeting and by whom?

A. Mr. Serio had asked Mr. Lally why I had been terminated and Mr. Lally had told him that I had refused a direct order to take a truckload of material out that day. Mr. Serio asked me about it, and I went on to tell him what I had did that day and why, being sick, and Mr. Serio asked, did I have a doctor's excuse, and I did, and he asked me for it, and he showed it to Mr. Lally, and Mr. Lally told Mr. Serio that he didn't care whether I had a doctor's slip or not that I just wanted to take off that day because it was a pretty day and I didn't want the New York run, and I could get a doctor's excuse from any doctor for 10 or $20.

Q. Who was it that said that?

A. Mr. Lally.

Q. And then what happened?

A. Mr. Serio told Mr. Lally that, being that an employee has to be out over three days before he is required to show a doctor's slip, and that if he didn't take me back, being I was only out for one day and had a doctor's slip, that he would have to take it to arbitration. He had asked Mr. Lally, would he take me back before

then.

Q. Who asked him that?

A. Mr. Harry Serio, and Mr. Lally stated that he would not take me back under any conditions because of the fact of what I had said at the EEOC hearing, and Mr. Serio asked Mr. Lally what it was I had said, and Mr. Lally told Mr. Serio that I had concocted a story about the cats and complaining about the foreman and the dispatcher and the drivers, and that's when he said that he wouldn't take me back under any conditions. And Mr. Serio went on to tell him that he would take it to arbitration, and Mr. Lally told Mr. Serio that he would get in touch with him and let him know what his decision was after he talked to the lawyers. At that time, Mr. Serio asked Mr. Lally, would it be all right if I was to call back to find out what his decision was, and Mr. Lally said, yes. Call him back in the morning.

Q. Excuse me. Before we finish up that meeting, you told us about Mr. Lally having said you concocted some things, and you told us what some of those things were. Did he say when or where or how he thought you concocted those things?

A. At the EEOC meeting.

Transcript: (Lally - Direct) Volume 3 Page 152 to page 153.

THE COURT: All right.

A. What was the question again, sir?

Q. Do you recall what Mr. Shaheed said at that meeting relevant to his departure from the premises on April 18?

A. Well, his contention was that he was sick and he couldn't work and here is the doctor's certificate to prove it.

Q. Now, when you say here is the doctor's certificate, I direct your attention to D-25. Is that the doctor's certificate?

A. That is correct.

Q. That was provided--

A. Well, it is what he claimed was a doctor's certificate.

Q. And did you, at that meeting, make any statements about your position with respect to Mr. Shaheed's credibility?

A. Yes. I told him I didn't, just didn't believe him in that part of the story.

Q. And what did you say to him specifically?

A. With regards to the doctor's certificate?

Q. Yes.

A. I made comments in that area that it is not--it doesn't say you were sick. All it says, you were supposed to visit somebody on the 18th, and I made reference that doctors' certificates

are very easy to buy for 10 or $20, and that is fairly common.

Q. Did you, at any time, make reference to any statements which Mr. Shaheed had made during the course of the EEOC conference?

A. Yes.

Q. And what did you say, now speaking of what you said at the meeting of the union representatives with Mr. Shaheed on the 24th?

A. Well, Mr. Shaheed was saying to me that you don't believe me, why. And I sort of chuckled and said that after some of the wild stories you told yesterday, that is just an example. I don't believe you in just about anything you say.

Q. Now, what--

MR. SCHACHTER: I didn't hear the end of the answer.

(Court Reporter read pending answer.)

Q. Now, what were you referring to when you made that statement?

A. Well, at this time, I guess it's referred to as that famous cat story.

Q. Well, identify specifically for us and speak up, please.

THE COURT: What are you running, a market in cats?

THE WITNESS: No. We have two warehouse

cats, and we have no rats or mice in the warehouse.

THE COURT: Not on account of the cats?

THE WITNESS: Excuse me.

THE COURT: Not on account of the cats?

THE WITNESS: That I don't know. I am not an expert on [illegible].

Q. What was your recollection as to what Mr. Shaheed said at the EEOC conference relevant to cats in the warehouse?

A. Well, Mr. Shaheed was saying that cats--we, the company, were deliberately locking cats up in the truck that he was going to take out the next day so the cat would urinate in the truck and have cat fur all over the truck, and he thought the next morning he would turn on the heater and it would gag them.

Transcript: (Lally-Cross) Volume 2, Page 152 to Page 153

Q. Mr. Lally, when did you make the determination that Mr. Shaheed was not ill?

A. That morning or earlier that afternoon I came to that conclusion.

Q. You came to that conclusion at a time when you had not known whether or not Mr. Shaheed looked at his manifest? Isn't that true?

A. I was told that he had, and I just

assumed that if he had and it was all fake.

Q. You determined that if he had it was a fake?

A. If he looked at his--we are looking at two different things.

Looking at the manifest is the part on the contract. As far as Mr. Shaheed being sick, that was a judgment call on my part, and I just thought that he was taking a day off.

Q. What was that judgment based on?

A. Just--salesman language--we call it gut feeling.

Q. Your gut feeling about Mr. Shaheed?

A. That's correct.

Q. Nothing else?

A. Nothing else.

Q. After you made that determination you weren't interested any further in inquiring whether or not Mr. Shaheed had a legitimate illness or not. Isn't that correct?

A. After that I was interested to see if I could get a case that would win in arbitration.

Transcript: (Lally-Cross) Volume 3, page 44

MR. RIZZO: Objection, your Honor.

MR. SCHACHTER: Your Honor, these would reflect Adam Metal's personnel policies, if they formulated it, and set it to someplace.

THE COURT: What's the objection?

MR. RIZZO: I'm sorry, perhaps I misunderstood the question. He's talking about documents which wre sent from Adam Metal to Alcoa?

THE COURT: Yes

MR. RIZZO: Withdraw the objection, your honor.

A. We sent letters to Alcoa to things we were going to do to get their advice.

THE COURT: Anybody from Alcoa have anything to do with the decision you made to terminate Mr. Shaheed?

MR. SCHACHTER: What was the question, your Honor?

THE COURT: Anybody from Alcoa have any input or anything to do with your decision to terminate Mr. Shaheed?

THE WITNESS: I made the decision. I advised them that I made the decision. They looked at it from a contract standpoint to see if I was in violation of the contract. Since I was not they just let me go through the decision.

Transcript: (Lally-Cross) Volume 3, page 115

THE COURT: All right, we'll stop for lunch and resume at 2:00 o'clock.

How much longer are you going to be with this witness?

MR. SCHACHTER: You Honor, I don't exactly know, but approximately an hour.

THE COURT: That's all I'm going to give you because--

MR. SCHACHTER: I'll do my best to finish him.

THE COURT: You're going to finish him in an hour.

MR. SCHACHTER: I'll finish my areas of cross-examination.

THE COURT: You organize yourself to finish cross-examination of Mr. Lally in an hour. I've got the right to control the length and duration of the cross-examination and --

MR. SCHACHTER: You Honor, this is --

THE COURT: The time you've had plus another hour is entirely reasonable.

MR. SCHACHTER: Your Honor, this is a key witness.

THE COURT: Finish with him and quit for the day.

(Luncheon recess)

Transcript: (Lally-Cross) Volume 3, page 157

A. No, I learned of it when I read that report at a -- I think it was when you were over going through our files. That was the first time I saw it.

THE COURT: All right, I have to stop. you have any redirect, Mr. Rizzo?

MR. SCHACHTER: Your Honor, I petition to ask for a continuation of my examination on Monday.

THE COURT: The answer is no. I cannot devote my entire life to one lawsuit. You had plenty of time to cross-examine this man.

MR. SCHACHTER: Your Honor, I move to introduce the personnel files.

THE COURT: Wait until your case, rebuttal case.

MR. SCHACHTER: May I introduce the personnel files on my rebuttal case?

THE COURT: Have you got an redirect of this man?

MR. RIZZO: Your Honor, I have one.

MR. SCHACHTER: I object to the conduct --

THE COURT: Otherwise I will bring him back

Monday.

MR. SCHACHTER: I object to the conduct of the Judge cutting off my cross-examination.

THE COURT: I tell you, I have the authority to cut short a repetitive cross-examination that's getting nowhere.

MR. SCHACHTER: Your Honor, I am going into a matter which no one has examined on and it goes basically to the heart of the question.

THE COURT: You should have examined on it first.

MR. SCHACHTER: It goes to bias of the main witness against Mr. Shaheed.

THE COURT: What do you have to show about his bias?

MR. SCHACHTER: I have the fact that he was found by an operations manager siphoning gasoline and given a 30-day suspension despite the fact that he was siphoning gasoline from company trucks.

THE COURT: How long ago was this?

MR. SCHACHTER: This was 1977.

THE COURT: He's already admitted that. You heard about this?

THE WITNESS: Yes.

THE COURT: Is it in his employment file I presume?

THE WITNESS: Well, normally we throw it out at the end of three years, why it was in there I don't know.

MR. RIZZO: I don't understand what counsel is saying at this point.

MR. SCHACHTER: I'd like to finish my examination on it because Mr. Lally --

THE COURT: Look, young man, I have stopped your cross-examination. It is over.

MR. SCHACHTER: I understand, your Honor. I would like to make an objection for the record.

THE COURT: Put it in writing. You've had plenty of opportunity to cross-examine. You engaged in repetitive cross-examination.

MR. SCHACHTER: Your Honor, I think you have given Mr. Rizzo every opportunity to present his case and not given me the same opportunity.

THE COURT: All I hear is the same story over and over again. I only need to hear it once.

Can you conduct your redirect in a couple of minutes?

MR. RIZZO: Yes, your Honor.

THE COURT: Please do so.

EXCERPTS FROM THE RECORD

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

KHALIL T. SHAHEED, X

Plaintiff, :

v. : No. 81-1808 (HCM)

ADAM METAL SUPPLY CO., et al., :

Defendants. :

X

OBJECTIONS TO THE CONDUCT OF THE JUDGE

Plaintiff herein, Khalil T. Shaheed, through the undersigned attorney, hereby reiterates and states objections to the trial judge's conduct in restricting cross examination of Kenneth Lally:

1. Kenneth Lally is an individual defendant and the president of the corporate defendant. He is the only witness with knowledge of the events surrounding termination that defendants have stated that they would call;

2. Lally testified about a number of events that required extensive cross examination. By way of example and not by limitiation, Lally testified that he reviewed the entire personnel file of plaintiff. It thus was important to the resolution of the case to inquire into the importance and weight he gave to each document

therein;

3. Lally testified on direct for approximately two and one half hours to three hours;

4. Plaintiff started cross examination at approximately 10:30 a.m. on Friday March 12, 1982 and continued until approximately 1:00 p.m. During this time the court took two recesses of approximately one half hour each. Cross examination resumed in the afternoon for approximately one hour. Consequently, plaintiff had, at most two and one half hours to cross examine Lally;

5. During plaintiff's cross examination of Lally, the trial judge interrupted on several occasions, at times over the explicit objection of counsel. These interruptions both detracted from the time counsel had for cross examination and required additional questions to restore the pattern of examination;

6. Plaintiff's counsel was only informed by the trial judge shortly before the lunch recess at 1:00 p.m. that the judge intended to restrict examination. Even if it were otherwise proper to restrict valid cross-examination in this case, the court did not provide adequate notice to enable counsel to reshape questions and lines of examination;

7. Plaintiff had several additional lines of cross-examination which he estimates would take from between one half hour and one hour. These lines include questions that would bring out prior inconsistent statements, impeach credibility and bring out material facts reflecting on the

ultimate question to be decided by the court;

8. The trial judge had previously informed counsel for all parties that he would recess court at approximately 3:00 p.m. on March 12 so that he would be able to catch a flight at approximately 4:15 p.m. that afternoon;

9. The undersigned counsel believes that if court had remained in session until 4:30 p.m. as it had the day before, cross examination of Lally and the direct and cross examinations of defendants' other witness would have been completed;

10. These above objections do not replace other objections to the conduct of the judge made on the record, but supplement them.

s/ Paul Schachter
PAUL SCHACHTER
Attorney for Plaintiff

Dated: Newark, New Jersey
March 15, 1982

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Khalil T. Shaheed, Civ. No. 81-1808 (HCM)

Plaintiff :

v.

Adam Metal & Supply, et al., :

Defendants.

AFFIDAVIT OF PAUL SCHACHTER IN OPPOSITION TO DEFENDANT ALUMINUM COMPANY OF AMERICA'S MOTION FOR SUMMARY JUDGMENT

State of New Jersey
ss.
County of Essex

Paul Schachter, being duly sworn, deposes and says:

1. I am an attorney at law of the State of New Jersey (limited license) and I represent the plaintiff in this action. I am fully conversant with the circumstances of this case.

2. Kenneth R. Lally, President of Adam Metal, has made an affidavit swearing that N. Rebecca Shaw, "Adam Metal's attorney", formulated the position to be taken at the E.E.O.C. Fact Finding hearing in this matter. See Exhibit A hereto.

3. N. Rebecca Shaw, attorney in the General Counsel's office of ALCOA, has made an affidavit swearing that she is an employee of Aluminum Company of America (ALCOA) who has been rendering legal advice to Lally and to Adam Metal, ALCOA's subsidiary, throughout these proceedings. See Exhibit B hereto.

4. ALCOA is consulted by Adam in matters involving personnel policy and practice, and ALCOA makes effective recommendations to Adam. See Exhibits C through F hereto, originally produced as appendices to ALCOA's answer's to Plaintiff's Interrogatories.

5. These statements by ALCOA and Adam themselves create a factual conflict with the statements produced by ALCOA in support of its Motion for Summary Judgment.

/s/ _____
Paul Schachter

Sworn and suscribed to
before me this 9th day of March 1982.

/s/ Denise Reinhardt

_____
Attorney at Law of the
State of New Jersey

(Plaintiff's Exhibit No. 55)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

KHALIL T. SHAHEED,	:	
		Civil Action No. 81-
Plaintiff,	:	1808 (HCM)
		AFFIDAVIT OF
vs.	:	KENNETH R. LALLY
ADAM METAL & SUPPLY COMPANY, et al.,	:	
	:	
Defendants.		

STATE OF NEW JERSEY)
: ss.:
COUNTY OF UNION)

KENNETH R. LALLY, of full age, being duly sworn deposes and says:

1. I am a defendant in this action and am President of co-defendant Adam Metal Supply, Inc. I make this Affidavit upon my own personal knowledge and in response to a question propounded to me at my deposition of January 13, 1982.

2. The question to which I provde answer by this Affidavit is as follows: "Who formulates the position to be taken at the fact-finding conference?"

3. The answer to the foregoing question is that Adam Metal's attorney, N. Rebecca Shaw, Esq., formulated the position to be taken at the EEOC fact-finding conferences involving plaintiff.

/S/ Kenneth R. Lally

KENNETH R. LALLY

Sworn to and subscribed
before me this 2nd day
of March, 1982.

/s/_____
(Notary Public)

(Plaintiff's Exhibit No. 51-T)

State of New Jersey)
) SS:
County of Essex)

AFFIDAVIT

I Jack Muciaccia, being first duly sworn upon my oath, hereby state as follows:

I have been given assurances by an agent of the National Labor Relations Board that this affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open unless it becomes formal proceeding. Upon the closing of this case, the affidavit may be subject to disclosure only in accordance with Agency policy.

I reside at 271 Crescent Place, Yonkers, NY 10704

My telephone number is (914) 776-6129

I am employed by Adam Metal Supply Co.

located at 625 Evans Street, Elizabeth, NJ

I work as a traffic clerk;

2) I changed Shaheed's run on 4 occasions, in about January and February, 1980. Shaheed told me each time that he felt too nervous to drive into New York City those days. No others ever asked me to change their run. I was reprimanded once by Bob Miller, Operations Manager, in about March, 1980, for changing runs after they've been assigned. He said it was not part of my job to

change runs, and the men were complaining.

3) On 4/18/80 I saw Shaheed come to work and walk over to a table where delivery orders are placed. A few minutes later he came in to see me. He told me that he wasn't feeling well, he wanted me to give him a sick day, and he was going home. I said okay and he then left. I have read the above 3 paragraphs and swear them true.

(Excerpts from Plaintiff's Exhibit No. 4)

April 21, 1980

To File

From Elaine Pinion, EDS

Subject Khalil, Shaheed vs. Adam Metal Co.
Charge # 022790593

Fact Finding Conference Notes

Attendees:
Khalil Shaheed
(spokesperson) Kenneth R. Lally - President
Thomas Lovelidge - Financial Mgr.
Nancy R. Shaw - Resp's Gen'l Counsel

* * *

CP contends that the whites were always complaining about his truck. When CP complained, he was told the other driver (Grant B/M) drove that truck. CP states that some cats slept and urinated in his truck. The seat was smelling so bad Miller had a new seat installed. After CP refused to give a $1.00 for cat food, that's when he started to see cat hairs and smell urine.

Resp - CP's allegation that the cat(s) was deliberately placed in his truck is absurd. Shape driver's (CP's job title) never know if there's work for them until they report to work that morning. When trucks are loaded, the name of the regular driver is on the sheet, and not the shape

driver. Therefore, no one knows for sure, who is going to drive what truck.

CP - Agrees that shape drivers do not know if they have a job until they report that next morning.

* * *

END OF EXCERPTS FROM RECORD